

MOTION FILED
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No. 93-404

In The
SUPREME COURT OF THE UNITED STATES

October Term 1993

Arthur L. Gustafson, Daniel R. McLean
and Francis I. Butler

Petitioners.

v.

Alloyd Co., Inc. and Wind Point Partners II, L.P.

Respondents.

On Petition for Writ of Certiorari to the United
States Court of Appeals for the Seventh Circuit

PETITIONERS' MOTION FOR CONSOLIDATION

NOW COMES the Petitioners, Arthur L. Gustafson ("Gustafson"), Daniel R. McLean ("McLean") and Francis I. Butler ("Butler"), pursuant to Supreme Court Rule 27.3, and move this Court to consolidate this case with Allen & Company Inc. v. Pacific Dunlop Holdings, Inc., No. 93-201.

1. On September 9, 1993, Gustafson, McLean and Butler filed a petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. In this case, Respondents claim that material misrepresentations were made in connection with Petitioners' privately negotiated resale of substantially all of the common stock of Alloyd Co., Inc. in violation of Section 12(2) of the Securities Act of 1933 and in breach of the stock purchase agreement. The judgment of the district court in this case was

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vacated and remanded by the Seventh Circuit for "further proceedings in light of this court's opinion in Pacific Dunlop Holdings, Inc. v. Allen & Co., Inc., No. 91-2346 (7th Cir. May 7, 1993)."

2. The potential application of Section 12(2) of the Securities Act of 1933, 15 U.S.C. §771(2), to a privately negotiated secondary market transaction is a substantial, recurring legal question. A direct conflict exists among the circuit courts, and there is wholesale disarray in the district courts and among legal scholars, regarding the question presented. Compare Pacific Dunlop Holdings Inc. v. Allen & Co., Inc., 993 F.2d 578 (7th Cir. 1993) with Ballay v. Legg Mason Wood Walker, Inc., 925 F.2d 682 (3d Cir.), cert. denied 112 U.S. 79 (1991) and First Union Discount Brokerage Services, Inc. v. Milos, 997 F.2d 835 (11th Cir. 1993) (Respondents' Brief in Opposition recognizes Milos creates further direct conflict among the circuits). See also Petition at 10-12. Substantial statutory construction and policy issues are also raised by the question presented in interpreting the language and legislative history of Section 12(2) and the structure and purpose of the 1933 Act.

3. As noted in the Petition for Certiorari herein, on August 24, 1993, Allen & Company Inc. filed a petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit in Pacific Dunlop Holdings Inc. v. Allen & Co. Inc., 993 F.2d 578 (7th Cir. 1993), petition for cert. filed, 62 U.S.L.W. 3144 (Aug. 24, 1993) (No. 93-201). The question presented therein

is whether Section 12(2) of the Securities Act of 1933, 15 U.S.C. §771(2), provides a valid cause of action in a secondary market securities transaction and/or in a privately negotiated resale of securities. The Seventh Circuit's decision in Pacific Dunlop has a direct and controlling effect on the remand of this case from the appellate court to the trial court.

4. On October 4, 1993, the Court, recognizing the significance of the question presented, invited the Solicitor General to file briefs expressing the views of the United States in the Pacific Dunlop case. Allen & Company Inc. v. Pacific Dunlop Holdings, 114 S.Ct. 52 (62 U.S.L.W. 3242) (Oct. 4, 1993) (No. 93-201). A decision on the petition for writ of certiorari in that case will not be forthcoming until the government has set forth its views and concerns.

5. Pursuant to Supreme Court Rule 27.3, two or more cases involving the same or related questions, may be consolidated upon motion by any party. The facts and circumstances involved in this case and Pacific Dunlop are substantially similar. Both cases involve the secondary market sale of substantially all of the outstanding stock of an entity by means of a privately negotiated stock purchase agreement, and involve an alleged financial misstatement significantly affecting net income. Both actions also set forth causes of action based only on Section 12(2) and state law breach of contract without any allegation of intentional fraud under Section 10(b) of the Securities Exchange Act of 1934 or SEC

Rule 10b-5 promulgated thereunder, and were decided on summary judgment.

6. Pacific Dunlop sets forth a two part question presented:

Whether application of Section 12(2) of the 1933 Act is limited to initial distributions of securities?

Does Section 12(2) of the 1933 Act apply to a privately negotiated resale of securities that does not involve the distribution of stock to the public?

Petitioners have asked the Court to decide:

Whether Section 12(2) of the Securities Act of 1933 is applicable to a privately negotiated resale of all of the stock of a corporation.

The question presented by Petitioners is the same as and succinctly encompasses the questions set forth in Allen & Co. Inc. v. Pacific Dunlop Holdings, No. 93-201.¹

7. This case is currently pending before the district court awaiting final adjudication, either by summary judgment or at trial, of the Section 12(2) claim (which provides the only basis for federal jurisdiction). Unless the case is consolidated with Pacific Dunlop, that adjudication will have to be made without the guidance of this Court. Thus, the inconsistency existing among the circuits may be compounded by further inconsistencies among district courts in the Seventh Circuit, and between those courts and this Court.

¹ Although Pacific Dunlop involves a broker-seller and Gustafson involves shareholder-sellers, the questions presented are virtually identical and both focus on the primary issue of whether Section 12(2) applies to any secondary market transaction or private resale of securities regardless of the type of seller.

As a result of the substantial similarity in questions presented, underlying facts, district court holdings, and the direct impact of the Seventh Circuit's decision in Pacific Dunlop on the resolution of this case, Petitioners respectfully request this Court consolidate this case and Allen & Company Inc. v. Pacific Dunlop Holdings, Inc., No. 93-201.

Respectfully submitted,

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